CALIFORNIA TEACHERS ASSOCIATION
DEPARTMENT OF LEGAL SERVICES

April 5, 2007

Tami R. Bogert, General Counsel
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95184

RE: **Proposed Rulemaking Concerning "Card Check"**

Dear Ms. Bogert:

We submit the following comments to the proposed changes and additions to PERB regulations concerning proof of support and revocation of such proof.

SB 253 (Stats. 2003, Ch. 190) amended EERA to revoke the authority of public school employers to call for an election when presented with a request for recognition by an employee organization. Instead, an employer may call for an election only in four circumstances: when it doubts the appropriateness of the requested unit; when there is a competing organization that produces a 30% proof of support; where there is a contract bar; or when there is a recognition bar. Govt. Code §3544.1

The intent of SB 253 and the companion bill sponsored by the Hon. Loni Hancock (AB 1230) was to streamline the process of certifying an exclusive representative when it was clear that the majority of employees in the unit wished to be represented by the petitioning union. The point was to make it easier for employees' desires to be manifested, rather than more cumbersome. As PERB itself recognizes, "...the review of the proof of support constitutes the 'election.'" [Initial Statement of Reasons, p. 2.]

The California Teachers Association believes that these proposed regulations are at odds with the intent and plain meaning of this legislation in several respects, and strongly opposes them in their current form.

32700(a)(1) Proof of Support

The last sentence of this paragraph would require that proof of support submitted with a petition requiring recognition without an election (the "card check") must "clearly demonstrate

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that the employee understands that an election may not be conducted."

As PERB itself has acknowledged, the card check by PERB *is* the election. It is also the law–a union may become certified as the exclusive representative by card check alone. Statements "warning" an employee that there might not be an election are no more necessary than requiring statements informing consumers before every commercial transaction in California that they will have to pay a sales tax. There is no expectation of an election, unless the employer doubts the appropriateness of the unit or there is a competing organization. In the absence of such expectation, there is no need to "warn" the employees that they may not have one.

This proposed regulation also undermines and impliedly contradicts the statute. Govt. Code §3544 provides that proof of majority support shall be

> on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees.

This law permits membership as well as petitions clearly stating the employees' wishes to designate the union as exclusive representative to represent a vote for exclusivity.

Yet this proposed regulation eliminates the concept that membership in a union constitutes an employee's choice of that union as exclusive representative. Realistically, membership applications (which have been accepted by PERB as proof of support), notarized membership lists, or requests for dues deduction cannot have statements as proposed by this regulation. Individuals join unions for a variety of different reasons. They may have joined before an organizing campaign began at their workplace. It would be a confusing *non sequitur* to require a statement that "an election might not be conducted" when that is not an issue at the time a person joins.

Similarly, a notarized membership list will not be able to contain the proposed notice because it represents members who may have joined before any organizing campaign was underway or joined for reasons other than to have the union be the exclusive representative. Yet the Legislature has decreed that such lists, regardless of employee motivation for joining, can provide the necessary proof of support to a representation petition or request.

We note also that the University of California (and perhaps other employers) attempted to get similar language to this proposed sentence into AB 1230 itself. [1] They were unsuccessful.

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[1] See Attachment A to these comments, which are the University's requested amendments. The first paragraph of its letter suggests the addition: "(B) A proof of support documents signed by an employee shall include the following text in 12 point typeface or larger: 'I understand that if I sign this document a union may be certified without my having an opportunity to vote. ...'."

PERB may not now accomplish by regulation what the Legislature considered and rejected.

This proposed regulation would effectively erase what the Legislature intended because it will render it impossible to submit any kind of proof of support other than authorization cards or petitions. Such a change must come only from the Legislature. There is nothing in the statute that indicates the proof of support for requests for recognition be a narrower class than proof required for other representation petitions. We respectfully suggest that this proposed regulation exceeds PERB's rule-making authority.

32700(g) Investigation of fraud or coercion

CTA believes that this entire section should be eliminated. It replicates a remedy already available in the form of unfair practice charges, but removes any semblance of due process for the employee organizations that will be the object of such charges.

Govt. Code §3543.6(b) makes it unlawful for an employee organization to "impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." It cannot be gainsaid that employees have a right not to designate a union as their exclusive representative or otherwise refrain from supporting any union's organizing efforts. If an employee believed he/she had been coerced or tricked into signing some proof of support, the avenue of redress would be to file an unfair practice charge. After an evidentiary hearing in which the union could refute the claims or present evidence that the alleged fraud or coercion made no difference in the majority of support, PERB could fashion an appropriate remedy, including a recision of the certification.

In contrast, subparagraph (g) does not even require a party to serve the opposing party with the allegations or declarations. Thus, a union would not even be aware that such evidence was filed, and therefore not be able to refute it or challenge the authenticity of the evidence.

Nor does subparagraph (g) provide any standard or guidance to Board agents in determining that the showing of support is inadequate. Will a showing of support that 75 out 100 employees designated the union to be their exclusive representative be thrown out because one of those employees felt coerced? Such a result would work a grave injustice on the petitioning union and completely undermine the card check amendment.

This subsection also provides ample ground for employer mischief without providing any more meaningful protection to employees. It is a constitutionally defective short-cut around the unfair practice procedure. A petition supported by a majority of support should not be dismissed on the basis of secret declarations and a private *ex parte* investigation without benefit of live, sworn testimony before an administrative law judge and a determination by that judge that some impropriety occurred, and that impropriety made a numerical difference on the majority support.

PERB's Initial Statement of Reasons supporting these changes states on page 3: "The prima facie standard, more often utilized in unfair practice cases as a threshold question in the processing of a charge, is not appropriate in this context." Of course, we could not disagree more for the due process reasons discussed above. Without at least a prima facie standard, employers could unreasonably delay recognition based on a claim that even a single employee felt coerced. That subverts the intent of the statute.

32705 – Revocation of Proof of Support

As PERB recognized in *Antelope Valley Health Care District* (2006) PERB Dec. No. 1816-M, both the Meyers-Milias-Brown Act and HEERA contain language that permits an employer to refuse recognition on the basis if a card check if it reasonably doubts that the union has majority support. [Govt. Code §3574(a); §3507(c): "No public agency shall unreasonably withhold recognition of employee organizations."]. In contrast, EERA contains no such language. It simply directs:

> The public school employer *shall* grant a request for recognition filed pursuant to Section 3544 unless any of the following apply:... (emphasis added.)

The "following" do not include any doubt, reasonable or otherwise, about majority support. As the Board stated in *Antelope Valley*, "...EERA also does not contain an exception for 'reasonable doubt' as to majority status and the statute has never been construed to authorize that exception." [slip op. p. 10.]

This difference between the statutes, considered significant by the authors of *Antelope Valley,* is not reflected in these proposed regulations. The absence in EERA of any "reasonable doubt" exception to the employer's duty to recognize a union who has majority support in the appropriate unit indicates that there is no place for a revocation procedure. The language of HEERA and the MMBA, as amended, clearly demonstrates that the Legislature knew how to provide for the "reasonable doubt" exception. Yet it chose not to do so in amending EERA. If the EERA employer cannot refuse recognition based on any doubt of majority support, then PERB should not insert in the statute that which was consciously avoided by the Legislature.

Should there be any suggestion that authorizations were obtained fraudulently, existing unfair practice procedures could adequately test such allegations. EERA card check is analogous to voting absentee in a political election. Voters can submit their ballots by mail weeks before election day. Some of those early voters may have second thoughts, but having mailed their ballot, they cannot rescind their vote.

Additionally, all statutes administered by PERB that provide for card check permit only an employee organization to submit proof of support. Allowing revocations removes from the employee organization that exclusive function. This changes the clear terms of the statutes, and

PERB is not authorized to do that.[2]

In the event PERB holds to its proposal to permit revocations of authorizations, and without waiving CTA's right to legally challenge such changes, we offer the following comments.

1. Revocations must be served on the employee organization that submitted the initial authorization.

The proposed regulation 32705(a)(2) and (c) provides for confidentiality or anonymity of the person revoking authorization. While this makes sense and has been the longstanding rule with respect to divulging evidence of support to the employer, it makes no sense to keep the identities of these individuals from the union that initially relied on their signatures as part of its proof of support.

The National Labor Relations Board has ruled on more than one occasion that in order to be valid, the union must be notified of a revocation prior to the demand for recognition. *Alpha Beta Co.* (1989) 294 NLRB 228, 230:

> Is is well established that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition.

See also *James Matthews & Co. V. NLRB* (8th Cir. 1965) 354 F. 2d 432, 438, quoting Restatement of Agency, "...a principal's revocation of his agent's authority is ineffective until communicated to the agent."

Practical considerations also support the unions' need to be informed of revocations. First, it needs to know how many revocations have been filed and who did so in order to perfect its proof of majority. If it knows who revoked, it could focus its organizing efforts on persuading other individuals to sign cards. Knowing who revoked would also enable the union to investigate the *bona fides* of such revocation.

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[2] *Antelope Valley, supra,* permitted revocations but in different circumstances. The case arose under MMBA, which gives PERB a very different role in the card check procedure. Under that Act, the local employer may prescribe its own procedures for conducting a card check. A designated neutral or the State Mediation and Conciliation Service is responsible for determining majority support. In this case, the SMCS did not resolve the issue of majority status, leaving to PERB the task of determining whether and on what basis to consider "revocations" as a necessary part of determining whether the employer had committed an unfair practice by not recognizing the union. This case therefore does not mean that PERB should undertake to amend statutes through its rule-making process.

The cloak of confidentiality that keeps employers from learning who signed authorization cards is not necessary with respect to the union. The union does not have the power to terminate employment in the public sector. And as pointed out previously, if there is any unlawful coercion, the employee could file an unfair practice against the union.

It is well-settled that the employee organization submitting the proof of support "owns" that proof. This principle is evidenced by the first paragraph of proposed Rule 32705: "Proof of support documents submitted to the Board may only be withdrawn by an authorized representative of the petitioning party." If the proof of support is the property of the union, it has a right to know that the support has eroded. Hiding from the union the identities of those who revoked effectively denies the union's right to perfect a proof of support, a right clearly provided for in Rule 32784(b).

2. Revocations should only be considered valid if they are filed with PERB prior to the union's request for recognition.

This would conform to NLRB case law. *James Matthews & Co., supra,* 354 F. 2d at 438; *Alpha Beta Co., supra,* 294 NLRB at 230; *Raley's* (2006) 348 NLRB No. 25, fn 3 of ALJ's decision. The operative inquiry is whether the union had majority support *at the time* the request or petition for recognition was made.

To permit revocations after the request is made is to invite employers to engage in the very conduct the card check legislation was designed to avoid–unconscionable delay while doing everything possible to erode employees' support for the union.

3. Revocations that pre-date authorizations will not be valid.

This would give effect to the employee's most recent choice up to the time a request for recognition is submitted.

4. Employers should be prohibited from encouraging revocations.

Despite the "employer free speech" doctrine, it must be recognized that the employers' opinions about unions, often delivered in a captive audience setting and filled with misrepresentations and half-truths about the consequences of collective bargaining, is inherently coercive. The union, whose representatives are often denied access to school workplaces and who are usually not present during the entire workday, cannot compete with such speech.

The purpose of the card check statutes was to provide a streamlined, effective and fair opportunity for employees to express their desires to be represented by an employee organization. The process is sometime referred to as "neutrality agreement" when engaged in by the private sector. In order for there to be true neutrality, the employer should not be permitted to encourage revocations.

32784 Board Determination Regarding Proof of Support [Unit Modification]

Paragraph (a) of this proposed rule eliminates the 20-day period within which an employer has to file with PERB a list of employees names and job titles. CTA objects to removing the 20-day time period and replacing it with "as directed by the Board." This could make PERB unwittingly complicit in a delay of recognition.

It has always been within the discretion of the Regional Director or other Board agents to grant extensions of time for filing *Excelsior* lists and other documents. If an employer needs more time, it could be granted without an open-ended regulation such as that which is proposed. If the intent of this proposed regulation is to get the list sooner than 20 days, it should read: "...within 20 days or earlier, as directed by the Board...".

We also believe that this list should be made available to the requesting/petitioning employee organization both in the context of unit modifications and with initial requests for recognition. Otherwise, employers could place individuals on the list who are not in the requested unit, artificially inflating the number of employees in the unit and thereby potentially increasing the number required to show a majority. Without a copy of the list, the union would have no way of challenging its validity.

Sincerely,

Priscilla Winslow

Priscilla Winslow
Assistant Chief Counsel

Attachment A

UNIVERSITY OF CALIFORNIA
Requested Amendments to AB 1230 (Hancock), As Amended on 4/8/03

Additions indicated by underline
Deletions indicated by ~~strikethrough~~

1 page 4 line 12 add:

(B) A proof of support document signed by an employee shall include the following text in 12 point typeface or larger: "I understand that if I sign this document a union may be certified without my having an opportunity to vote. I also understand that if a union is certified, it may require the University to deduct fair share service fees from my pay."

2. page 4 line 12 add:

(C) If an employee organization submits documents in proof of support, signed by employees, that do not include the above text in 12-point typeface or larger, the employee organization shall not be certified except as the result of an election.

3. page 4 line 12 strike and add:

~~(B)~~ (D) In the event the petitioning employee organization does not provide proof of support of more than 50 percent of the members of the appropriate unit, or another employee organization provides proof of support of at least 30 percent of the members of the appropriate unit, then the procedures of paragraph (1) shall apply.

4. page 4 line 37 add:

SEC. 3. Section 3577(a) of the Government Code is amended to read:

(a) Upon receipt of a petition filed pursuant to Section 3575 or 3576 the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearings. If the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3574, it shall order that an election shall be conducted by secret ballot placing on the ballot all employee organizations evidencing support of at least 10 percent of the members of an appropriate unit, and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on the initial ballot the choice of "no representation". If, at any election, no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election. If a petition filed pursuant to Section 3576 includes evidence that more than 50 percent of the members of the certified unit support decertification of the exclusive representative, and if the petition does not request that another employee organization be certified as the exclusive representative, then the board shall decertify the incumbent exclusive representative.

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Stephen A. Arditti, Assistant Vice President and Director

July 31, 2003

The Honorable Gray Davis
Governor
State Capitol
Sacramento, CA 95814

Dear Governor Davis:

Re: AB 1230 (Hancock), As Amended on June 17, 2003

The University of California (UC) respectfully requests that you veto AB 1230. This measure would amend the Higher Education Employer-Employee Relations Act to require the Public Employment Relations Board (PERB) to certify an employee organization as an exclusive representative for the purpose of collective bargaining, if the employee organization provides proof of support from more than 50 percent of the unit. UC opposes AB 1230 because it would require certification of a union without an election and deny employees an opportunity to make fully informed decisions regarding union membership.

In an effort to work with the author to find a compromise, UC proposed an amendment that would have permitted certification of a union without an election and provided employees some information regarding union membership. Specifically, UC requested an amendment to require union authorization cards to include text explaining that a union may be certified without an election, and if certified, the union may require the University to deduct fair share service fees from an employee's pay. Under AB 1230, unions would not be required to disclose this factual information to employees when circulating authorization cards. Unfortunately, Assembly Member Hancock did not accept the proposed amendment.

Employees of the public schools, community colleges, and state agencies all enjoy the benefits of a representation election. When asked to consider joining a union, these employees have ample time to learn about the significance of union membership, gain a full understanding of collective bargaining, and review the employer's record of responsiveness to employee concerns. Those who decide to join a union have time to research prospective representatives. Most importantly, employees have an opportunity to make their decision regarding exclusive representation in the privacy of a polling booth, free from any outside influences. They also have the flexibility to choose "no representation," an option that must be presented in an election. AB 1230 would deny University employees these benefits.

Elections do not appear to have impeded union organizing at UC. Since 1980, UC employees have selected exclusive representation in 32 of 44 elections. Over 40 units (systemwide and local combined) represent approximately 67,000 employees, or about 65 percent of the employees eligible for union membership.

As always, we appreciate your consideration of our views and your consistent support of the University.

Sincerely,

Stephen A. Arditti
Assistant Vice President and Director
State Governmental Relations

cc: Assembly Member Loni Hancock
Legislative Secretary Linda Adams
Special Assistant and Liaison to the Senate Bill Lloyd
Secretary Kerry Mazzoni
Director Marty Morgenstern, Department of Personnel Administration
President Richard C. Atkinson
Senior Vice President Bruce B. Darling